Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

WHEELING COLLEGE, INC., A West Virginia corporation, THE MOST REVEREND BERNARD W. SCHMITT, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, and THE OHIO COUNTY BOARD OF EDUCATION,

Petitioners,

v.

THE CITY OF WHEELING, WEST VIRGINIA, a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Appeals of West Virginia and the Circuit Court of Ohio County, West Virginia, as state courts of competent jurisdiction, erred in not following the holding of this Court in *Howlett v. Rose*, 496 U.S. 356 (1990) by not hearing and determining issues presented to them that arose under the U.S. Constitution.

2. Whether the Supreme Court of Appeals of West Virginia erred in not following the holding of the U.S. Court of Appeals for the Fourth Circuit in *Folio v. City of Clarksburg*, 134 F.3d 1211 (4th Cir. 1998) and *United States v. City of Huntington*, 999 F.2d 71 (1993), *cert. denied*, 510 U.S. 1109 (1994) that, for purposes of federal law, the Fire Services Fee imposed by the City of Wheeling, West Virginia on all owners of real property within the City is a tax.

3. Whether the Supreme Court of Appeals of West Virginia erred in disregarding this Court's decision in *Allegheny-Pittsburgh Coal Co., Inc. v. Webster County, West Virginia*, 488 U.S. 336 (1989) in not holding that the City of Wheeling violated the Equal Protection Clause of the Fourteenth Amendment by attempting to assess a property tax against the Petitioners where the federal government was not obligated to pay the tax and the applicable state statute, W. Va. Code Section 11-3-9, placed both the Petitioners and the federal government in the same class of property owners wholly exempt from taxation on property.

QUESTIONS PRESENTED FOR REVIEW – Continued

4. Whether the Supreme Court of Appeals of West Virginia erred in disregarding this Court's decision in *Allegheny-Pittsburgh Coal Co., Inc. v. Webster County, West Virginia*, 488 U.S. 336 (1989) in not holding that the City of Wheeling violated the Equal Protection Clause of the Fourteenth Amendment by disregarding Article X, Section 1 of the West Virginia Constitution and levying a tax on property on bases other than assessed valuation.

LIST OF PARTIES BELOW

The following persons or entities were parties to the actions reviewed by the Supreme Court of Appeals of West Virginia in *City of Clarksburg v. Grandeotto, Inc.*, ___ W. Va. ___, ___ S.E.2d ___ (1998):

Wheeling College, Inc., a West Virginia corporation

The Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston

Ohio County, West Virginia Board of Education

City of Wheeling, West Virginia, a municipal corporation

City of Huntington, West Virginia, a municipal corporation

City of Clarksburg, West Virginia, a municipal corporation

Mid-City Land Company

Grandeotto, Inc.

Bernard J. and Kathy A. Folio

Bernard J. Folio d/b/a Highrise Associates

Kathryn Folio

Joseph Folio

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The opinion of the Supreme Court of Appeals of West Virginia in *City of Clarksburg v. Grandeotto, Inc.* is not yet reported in either the West Virginia Reports or West's Southeastern Reporter, Second Series. It is available online on WESTLAW at 1998 WL 874967 and is reprinted below at App. 1-19. That court's order denying the Petitioners' petition for rehearing is also not generally reported and is reprinted at App. 29-30.

The relevant opinion and orders of the Circuit Court of Ohio County, West Virginia are unreported. That Court's August 19, 1998 Findings of Fact, Conclusions of Law and Order granting the City of Wheeling's motion for summary judgment and denying the Petitioners' cross-motion is reprinted at Appendix 20-26. Its August 28, 1998 order certifying the August 19, 1998 order as final and appealable is reprinted at App. 27-28.

STATEMENT OF JURISDICTION

The Petitioners seek a writ of certiorari to the Supreme Court of Appeals of West Virginia for review of the December 14, 1998 decision of that court in *City of Clarksburg v. Grandeotto, Inc.*, ___ W. Va. ___, ___ S.E.2d ___, 1998 WL 874967 (1998). That court denied the Petitioners' petition for rehearing on January 28, 1999.

The jurisdiction of this court arises under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

U.S. CONSTITUTION, ARTICLE VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WEST VIRGINIA CODE, SECTION 8-13-13:

§ 8-13-13 Special charges for municipal services.

Notwithstanding any charter provisions to the contrary, every municipality which furnishes any essential or special municipal services, including, but not limited to, police and fire protection, parking facilities on the streets or otherwise, parks and recreational facilities, street cleaning, street lighting, street maintenance and improvement, sewerage and sewage disposal, and the collection and disposal of garbage, refuse, waste, ashes, trash and other similar matter, shall have plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such service, to make reasonable regulations with respect thereto, and to impose by ordinance upon the users of such service reasonable rates, fees and charges to sewerage and sewage disposal service and any service incident to the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter shall be subject to the provision of chapter twenty-four [§ 24-1-1 *et seq.*], of this code. . . .

WEST VIRGINIA CODE, SECTION 11-3-9 (superseded):

All property, real and personal described in this section, and to the extent herein limited, shall be exempt from taxation, that is to say: Property belonging to the United States, other than property permitted by the United States to be taxed under state law; . . . property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture; property belonging to, or held in trust for, colleges or universities located in West Virginia, or any public or private nonprofit foundation or corporation which receives contributions exclusively for such college or university, if the property or dividends, interest, rents or royalties derived therefrom are used or devoted to educational purposes of such college or university; . . . all real estate not exceeding one-half acre in extent, and the buildings thereon, and used exclusively by any college or university society as a literary hall, or as a dormitory or clubroom, if not leased or otherwise used with a view to profit; . . .

WEST VIRGINIA CODE, SECTION 11-3-9 (as amended):

§ 11-3-9. Property exempt from taxation

(a) All property, real and personal, described in this subsection, and to the extent herein limited, is exempt from taxation:

(1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;

*****

(9) Property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture;

> (10) Property belonging to, or held in trust for, colleges or universities located in West Virginia, or any public or private nonprofit foundation or corporation which receives contributions exclusively for such college or university, if the property or dividends, interest, rents or royalties derived therefrom are used or devoted to educational purposes of such college or university.
>
> *****

CODIFIED ORDINANCES OF THE CITY OF WHEELING, ARTICLE 793:

793.01 Legislative Purpose.

> . . . at the charge and expense of the owners of buildings and structures of every kind and nature within the City, . . . which owners and occupiers are declared to be the users and beneficiaries . . . .

793.03 Imposition of Fire Protection Charge.

> (a) There is hereby imposed . . . a fire protection fee or charge. . . .

STATEMENT OF THE FACTS OF THE CASE

A. Factual Background

1. The Parties

Wheeling College, Inc., now known as Wheeling Jesuit University ("Wheeling Jesuit" or the "University"), is a corporation that operates a religiously affiliated private university in the City of Wheeling, West Virginia ("Wheeling" or the "City"). It is exempt from taxation by the federal government pursuant to section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It owns real property that lies within the geographic limits of the City.

The Most Reverend Bernard W. Schmitt (the "Bishop" or the "Diocese") is the bishop of the Roman Catholic Diocese of Wheeling-Charleston, West Virginia. Among its many activities throughout the State, the Diocese operates one high school and four elementary schools within the City. The Diocese owns the real estate on which these schools sit. The Diocese is also exempt from federal taxes under 26 U.S.C. § 501(c)(3).

The Ohio County Board of Education (the "Board") operates free public schools throughout Ohio County, West Virginia. Several of these schools are located within the City. The Board is also not subject to federal taxes.

The City is a municipal corporation organized pursuant to Chapter 8 of the West Virginia Code, W. Va. Code §§ 8-1-1 *et seq.*

2. West Virginia's Statutory Exemption From Taxation

Since its creation in 1863, the State of West Virginia has continuously recognized an exemption from taxation for certain types of real and personal property, including property held by independent and public not-for-profit educational institutions that is used for educational purposes. This exemption applies to all non-federal taxes, whether levied by the State itself, by counties or by municipal corporations. The current statutory exemption is authorized by Article X, Section 1 of the West Virginia Constitution and is codified at section 11-3-9 of the West Virginia Code.[1]

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[1] The West Virginia legislature amended W. Va. Code § 11-3-9 in 1998, while this action was pending before the Circuit Court of Ohio County, West Virginia. Nothing in the language of this amendment would appear to affect the resolution of this action, and the City has never argued that it would do so. For the convenience of this Court, both the prior and amended versions of this section are set forth above.

As all parties agree, each of the Petitioners is exempt under this section from any taxes levied by the City. There is also no dispute that this section is a lawful exercise of the Legislature's power under the West Virginia Constitution.

3. The City of Wheeling's Assessment for Fire Services

Purporting to act under the authority of section 8-13-13 of the West Virginia Code, the City has enacted a charge for the declared purpose of defraying the cost to the City of providing fire services (the "Fire Charge"). The Fire Charge is codified at Article 793 of the City's ordinances. At all times relevant to this action, the City has levied the Fire Charge against certain real property within its borders and certain motor vehicles registered to addresses in the City. Although the proceeds of the Fire Charge are nominally earmarked for provision of services by the City of Wheeling Fire Department, they are deposited directly into the City's general fund.

At no time has the amount of the Fire Charge actually depended upon an owner or tenant's actual use of the services of the City of Wheeling Fire Department. Although the rates were increased in 1993, the manner in which the City has calculated the Charge has remained constant throughout the period relevant to this action: Owners of residential structures are assessed a flat annual fee; owners of non-residential structures are assessed an amount based upon the square footage of their structures; tenants of all structures are assessed a flat fee; and a flat charge is levied on motor vehicles.

Although Article 793 does not contain any exemptions from the Fire Charge on its face, the City has not levied the Fire Charge against all owners of real property in the City in a uniform manner. Significantly, the City does not collect the charge from the General Services Administration (the "GSA"), the principal entity through which the federal government owns land in the City.

Pointing to *United States v. City of Huntington*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994), as authority, the GSA has maintained that the Fire Charge is a tax for purposes of federal law and that the Supremacy Clause of the U.S. Constitution precludes the states and their subordinate entities from taxing the federal government. In the face of this refusal, the City has not taken any steps to collect the Fire Charge from the GSA.

B. Procedural History

1. Proceedings in the Circuit Court of Ohio County, West Virginia

The University and the Bishop commenced their action against the City in the Circuit Court of Ohio County, West Virginia (the "Circuit Court") in 1995. They sought a declaration that the Fire Charge was in actuality a tax from which they were exempt pursuant to section 11-3-9 of the West Virginia Code. They further argued that, because the West Virginia Legislature had exempted them from taxes *in the same manner and to the same extent* that it had exempted the federal government, the City's efforts to collect the Fire Charge from them while foregoing any effort to collect it from the GSA violated their rights under the Equal Protection Clause of the U.S. Constitution. They argued that, because federal substantive rules of decision clearly indicated that the Fire Charge was a tax, and because the current enforcement scheme would never equalize the amount that they paid with the amounts that the federal government paid on similar properties, the Fire Charge could not validly be applied to them. In responding, the City filed a counterclaim seeking approximately $200,000.00 in allegedly past due Fire Charge.

The City instituted its collection action against the Board in the same court in 1996, seeking payment of a Fire Charge of more than $800,000.00. Because the Board posited essentially the same defenses to the Fire Charge that the Private Plaintiffs had raised in their action, the

court below consolidated the two actions. Discovery proceeded apace, and, in January 1998, the Petitioners and the City filed cross-motions for summary judgment.

The Circuit Court granted the City's motion by Findings of Fact, Conclusions of Law and Order of August 19, 1998. Appendix at 20-26. It held that, under *City of Huntington v. Bacon*, 196 W. Va. 457, 473 S.E.2d 743 (1996), it was bound to conclude that the Petitioners were authorized to pay the Fire Charge. Appendix at 24-25. That court further held that, because of the *Bacon* decision, it lacked authority to consider the Petitioners' claim that the Fire Charge violated the U.S. Constitution. Appendix at 24-25. By order of August 28, 1998, the court below clarified that its August 19 order was final and could be appealed. Appendix at 27-28.

2. Petition for Appeal to the Supreme Court of Appeals of West Virginia

On October 7, 1998, the Petitioners jointly petitioned the Supreme Court of Appeals of West Virginia (the "Supreme Court of Appeals") for appeal of the Circuit Court's judgment. In their petition, they offered three assignments of error:

1. That the Circuit Court had erred in not holding that the City's universal, involuntary Fire Charge was a tax on property from which the Petitioners were exempt under Section 11-3-9 of the West Virginia Code.
2. That the Circuit Court had erred in concluding that this court's decision in *City of Huntington v. Bacon* prevented it from considering the Petitioners' argument that the City's application of the charge to them violated the U.S. Constitution.
3. That the Circuit Court had erred in failing to hold that the City's application of the Fire Charge to the property owned in the City by the Petitioners, but not to property owned

by the federal government, violated the Petitioners' rights under the Equal Protection Clause of the U.S. Constitution.

The Petition for Appeal discussed each of these issues.

By Order of October 15, 1998, the Supreme Court of Appeals granted the petition and agreed to consider the issues presented in the Petition for Appeal. At the same time, the Supreme Court of Appeals also granted the Bishop's petition for appeal in *City of Huntington v. Schmitt*, which sought review of a decision of the Circuit Court of Cabell County, West Virginia in an action presenting issues that were virtually identical.[2] The court consolidated these cases for argument with *City of Clarksburg v. Grandeotto, Inc.*,[3] which the court had previously scheduled for argument on November 10, 1998, and issued an expedited briefing schedule under which the Petitioners' petitions for appeal was to be treated as a brief on the merits. The City filed its brief by the court's deadline and addressed each of the issues raised by the Petitioners.

The Petitioners filed a consolidated Reply Brief on November 6, 1998. In that brief, they took care to note that, because the questions that the Supreme Court of Appeals had agreed to consider involved both the express reconsideration of its decision in *Bacon* and issues arising under federal law, the court could not affirm the decision by reference to *Bacon* alone. The Petitioners further restated their arguments that the court's *Bacon* decision was incorrect as a matter of West Virginia law and

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[2] Simultaneously with the filing of this Petition, the Bishop has petitioned this Court for a writ of certiorari reviewing the decision of the Supreme Court of Appeals in the context of the Cabell County Action.

[3] *Although City of Clarksburg v. Grandeotto, Inc.* also involved challenges under state law and the Equal Protection Clause to a "municipal service fee" purportedly enacted pursuant to W. Va. Code § 8-13-13, all of the landowners in that case were either for-profit corporations or natural persons.

that Wheeling's practice, even if nominally authorized by state law, violated the Equal Protection Clause.

The Petitioners participated in oral argument before the Supreme Court of Appeals on November 10, 1998. At that argument, counsel for the Petitioners argued each of the issues raised in the petitions for appeal. Counsel for the City responded only that, although the City already taxed all non-exempt property within its limits at the maximum rate permitted under the West Virginia Constitution, the Fire Charge and the Service Fee were somehow "necessary" for the City to continue to provide fire services.

3. The Decision of the Supreme Court of Appeals

On December 14, 1998, the Supreme Court of Appeals issued a *per curiam* decision in affirming the decisions below. *See City of Clarksburg v. Grandeotto, Inc.*, ___ W. Va. ___, ___ S.E.2d ___, 1998 WL 874967 (1998). Appendix at 1-15. The *per curiam* opinion ignored the Petitioners' arguments and looked no further than the syllabus points of the court's state-law-based decision in *Bacon*. The opinion noted that *Bacon* had distinguished *United States v. City of Huntington*, in which the Fourth Circuit had held that Huntington could not collect the Service Fee on property owned by the federal government, 999 F.2d at 73, from the facts before it on the basis that "a federal right is not involved." Appendix at 13-14 (citing *Bacon*, 473 S.E.2d at 750-51). It added, "The Fourth Circuit's holding did not apply to the Bacons or to the Board of Education. The same is true for the appellants in the case *sub judice*." Appendix at 14. The court then restated its Syllabus Points 6 and 8 from *Bacon* – the latter of which dealt with a board of education's statutory authority to pay a municipal service fee, a matter not raised by the Board – and offered no new reasoning in support of its decision. Appendix at 14-15.

Two justices on the five-member court dissented. They stated that they would find that the City's practices violated the Equal Protection Clause:

> [I]f the federal government is immune from paying a "fee," the other entities listed in W. Va. Code § 11-3-9 are also. To say otherwise is a clear denial of equal protection to the churches and schools. Sadly, their recourse must now be to the federal courts to set things right. Accordingly, I would find that W. Va. Code § 11-3-9 exempts the Diocese and the schools from paying the "fees" at issue. . . . By holding to the contrary, the majority opinion opens the door to additional taxes and an increasing burden on those institutions that are, under our Constitution and by law, exempt from such taxation.

Appendix at 19 (Maynard, J., dissenting).

4. Motion for Reconsideration

The Petitioners filed a Petition for Rehearing with the Supreme Court of Appeals on January 13, 1999.[4] The Petitioners submitted that the Supreme Court of Appeals had erred in overlooking and not resolving their assignments of error arising under the U.S. Constitution. They expressly pointed to parallels between this decision and the posture in which this Court reversed the decision of the Supreme Court of Appeals in *Allegheny Pittsburgh Coal Co., Inc. v. County Commissioners of Webster County, West Virginia*, 488 U.S. 336 (1989). They further submitted that the court had erred in not concluding that the City's

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[4] The Bishop also joined in the Petition for Rehearing with regard to the Supreme Court of Appeal's affirmance of the decision of the Circuit Court for Cabell County and petitioned the Supreme Court of Appeals for rehearing on January 13, 1999.

scheme of taxing them while treating the federal government as exempt from the Fire Charge violated their right to equal protection.

The Supreme Court of Appeals denied the petition for rehearing on January 28, 1999. *See* Appendix at 29-30. Although one of the justices who dissented from the Supreme Court of Appeal's initial decision had left the court in the interim, the court denied the petition for rehearing by a similar three-to-two vote. Appendix at 30.

REASONS FOR GRANTING THE WRIT

The circumstances under which this Court will grant a petition for writ of certiorari are set out in Rule 11 of this Court's Rules:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> *****
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> *****

In arriving at its decision in this matter, the Supreme Court of Appeals erred in respects that would support

review under both of these criteria. The court ignored the command of this Court in decisions such as *Howlett v. Rose*, 496 U.S. 356, 369 (1990) and *Felder v. Casey*, 487 U.S. 131 (1988) that a state court of competent jurisdiction must hear and consider issues presented to it that arise under federal law. To the extent, if any, that the court silently addressed the Petitioners' federal-law claims and defenses, it decided that, contrary to the holdings of the U.S. Court of Appeals for the Fourth Circuit in *Folio v. City of Clarksburg*, 134 F.3d 1211 (4th Cir. 1998) and *United Stutes v. City of Huntington*, 999 F.2d at 73, a "municipal services fee" imposed on all owners of real property without regard to the value of that property was a tax, rather than a service fee, for purposes of federal law. In the same manner, the Supreme Court of Appeals ignored the holding of this Court in *Allegheny Pittsburgh Coal Co.* that, where a state's law directs that all taxes upon property are to be assessed on the basis of assessed value, the taxation of property on some other basis that results in long-term and significant disparities in the amount paid violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. For these reasons, this Court should grant this petition and, on full review, reverse the decision of the Supreme Court of Appeals.

A. In Not Addressing and Resolving the Petitioners' Assignments of Error Arising Under the U.S. Constitution, the Supreme Court of Appeals Overlooked the Clear Teachings of this Court.

Just as federal courts must often apply rules of decision provided by state law, *see Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supremacy Clause of the U.S. Constitution requires state courts to apply federal law wherever appropriate:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States,

> shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art VI; *see also Public Service Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 247-48 (1952) ("State courts are bound equally with the federal courts by the Federal Constitution and laws.").[5]

This Court and the court below therefore have "a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' " *Felder*, 487 U.S. at 151 (quoting *Garrett v. Moore-McCormack, Co.*, 317 U.S. 239, 245 (1942)). In the absence of a "valid excuse," a state court of competent jurisdiction must consider the federal claims put before it. *Howlett*, 496 U.S. at 369-70.

The Supreme Court of Appeals erred in its failure to consider the Petitioners' federal constitutional claims, and the Circuit Court erred in its conclusion that it could not consider those claims. The State of West Virginia has clearly vested the circuit courts with jurisdiction to consider challenges to the validity, both facially and as applied, of municipal taxes and user fees. *See* W. Va. Const. art. VIII, § 6 (empowering circuit courts to exercise "original and general jurisdiction of all civil cases at law where the value or amount in controversy . . . exceeds one hundred dollars" and of all civil cases in equity); W. Va. Code § 51-2-2 (same, but increasing required amount

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[5] The Supreme Court of Appeals has itself previously recognized the supremacy of federal law and its obligation to adhere to that law. *See, e.g., Arbogast v. Arbogast*, 174 W. Va. 498, 327 S.E.2d 675, 679 (1984) (recognizing that the federal Parental Kidnapping Prevention Act "establishes a policy of federal preemption in enforcement of out-of-state custody disputes which, under the Supremacy Clause, takes precedence over state law and must be consulted first in determining whether the Kansas decree is entitled to enforcement here." (footnote omitted)).

in controversy to $300.00). Moreover, the circuit courts have frequently considered challenges to the validity of both municipal taxes and municipal user fees. *See, e.g., Bacon,* 473 S.E.2d at 748-49 (considering both circuit court's grant of summary judgment and question certified by circuit court on validity of charge denominated as "municipal service fee"); *Central Realty Co. v. Martin,* 126 W. Va. 915, 30 S.E.2d 720, 722 (1944) (reviewing circuit court's determination under W. Va. Code § 11-3-9 that property held in trust for benevolent association was exempt from property taxes).

The competence of the Supreme Court of Appeals to consider these issues is clear not only from its review of those circuit-court decisions but also from the constitutional and statutory provisions under which it was created. *See* W. Va. Const. art. VIII, § 3 (setting forth that Supreme Court of Appeals "shall have appellate jurisdiction in civil cases at law where the matter in controversy, exclusive of interest and costs, is of greater value or amount than three hundred dollars"); W. Va. Code § 51-1-3 (authorizing Supreme Court of Appeals to exercise appellate jurisdiction over civil cases in which, *inter alia,* amount in controversy is greater than or equal to one hundred dollars, a party challenges the right of a county to levy a toll or tax or a party challenges the constitutionality of a law). Consistent with this jurisdiction, the Supreme Court of Appeals and the circuit courts have previously heard and determined federal-law challenges to taxes imposed under the state's authority. *See, e.g., Capitol Cablevision Corp. v. Hardesty,* 168 W. Va. 631, 285 S.E.2d 412 (1981) (considering challenges to business and occupation tax under Commerce and Equal Protection Clauses of U.S. Constitution). Therefore, both courts below were required to consider those claims and to apply federal law to them.[6]

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[6] This duty of the state courts to hear and decide these federal constitutional issues is particularly strong here, as the

Although this Court acknowledged in *Howlett*, 496 U.S. at 369, that a state court might have a "valid excuse" not to consider a federal claim, no such excuse can be found here. To date, the only excuses that this Court has considered and deemed to be valid have involved "neutral rule[s] of judicial administration." *Id.* at 374.[7] Neither of the courts below offered such an excuse. The Supreme Court of Appeals never explained its failure to consider the federal issues. The Circuit Court stated only that it was bound by the reasoning of *Bacon*. The Supreme Court of Appeals did not decide the state-law claims presented to it in *Bacon* on the basis of any question of judicial administration, or even of procedure. Instead, it resolved that appeal by exercising jurisdiction over the parties before it and determining *as a matter of the substantive law of West Virginia* that the City of Huntington's municipal service fee was a user fee and not a tax. *See generally* 473 S.E.2d at 751-54. The Petitioners are not aware of any "rule of judicial administration" that might properly have precluded consideration by the court below of their federal-law challenge to the Fire Charge.

The facts on which this Court reversed the state court's judgment in *Howlett* are in many respects analogous to the facts here. There, the plaintiff brought an action in Florida state court against, *inter alia*, the school district in which he had attended high school. He alleged that the defendants, including several individual school

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federal courts have construed the Tax Injunction Act, 28 U.S.C. § 1341, to require these claims to be presented in the first instance to state – rather than federal – courts. *See, e.g., Folio*, 134 F.3d at 1214.

[7] Moreover, none of the three cases in which the *Howlett* Court acknowledged that neutral rules of judicial administration had precluded consideration of federal claims were decided on the basis of whether the plaintiffs' claims were federal in nature. Rather, the "neutral rule" in each case looked to either the residency of the parties or the locus of the events giving rise to the cause of action. *See* 496 U.S. at 374-75.

officials, had violated his rights under the Fourth and Fourteenth Amendments by searching his automobile on school property while he attended high school. He sought to recover damages under 42 U.S.C. § 1983. 496 U.S. at 359. The trial court dismissed his claim against the school district, and the intermediate appellate court affirmed. The appellate court reasoned that, because Florida had not expressly waived the statutory immunity of entities such as school boards to actions under § 1983, the petitioner's claim could not be maintained in a Florida state court. It further held that, regardless of the source of law that provided a claim against the state or its subdivision, the question of the immunity of the state and its entities to suit in its own courts was to be resolved by reference to its own law. *Id.* at 359-60. The Florida Supreme Court denied the plaintiff's petition for discretionary appeal, but this Court granted certiorari. *Id.* at 360.

On review, this Court reversed and held that, regardless of the forum, the issue of whether the school district was immune to the § 1983 claims was to be determined solely by reference to federal law. It first noted that, because of the Supremacy Clause, federal law was part of the law to be enforced in the courts of each of the states:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much law in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the

> State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

Id. at 367 (quoting *Clafin v. Houseman*, 93 U.S. 130, 136-37 (1876)) (alteration in original). Therefore, the Court reasoned, state courts could not decline to enforce a federal right in the absence of a "valid excuse." *Id.* at 370. To be "valid," this Court added, an excuse could not be "inconsistent with or violate[ ] federal law," *i.e.*, it could not be based upon either a disagreement with the policy expressed in federal law or in a refusal to recognize the supremacy of that law. *Id.* at 371.

This Court then concluded that the courts below had erred in finding the school board to be immune. It considered two possible interpretations of the appellate court's decision and found the decision to be infirm under either interpretation. First, this Court rejected the suggestion that the defendants might be entitled to state-created immunities over and above the immunities from § 1983 actions provided under federal law. This Court noted, "The elements of, and the defenses to, a federal cause of action are defined by federal law." It held that Florida lacked the power to overcome a settled line of federal case law under which all of the defendants were subject to suit under § 1983. *Id.* at 375-76. This Court then rejected the suggestion that Florida's sovereign immunity statute placed the plaintiff's claims outside the scope of the claims that the trial court had jurisdiction to hear. It noted that the trial court that had declined to hear the plaintiff's claim was established as a court of general jurisdiction. It added that the trial court regularly heard state-law tort claims brought by individuals against entities of the state and regularly awarded real damages. It concluded that Florida could not refuse to provide this forum to the plaintiff solely because the right he asserted was federally created. *Id.* at 378-79.

That holding cannot be reconciled with the conduct of the courts here. Like the state trial court in *Howlett*, the Circuit Court was established as a court of general jurisdiction. Because the City's claims against each of the Petitioners vastly exceeded the $100.00 and $300.00 jurisdictional requirements, the Petitioners' constitutional claims and defenses were properly before the Circuit Court. There was no excuse for the Circuit Court's failure to consider those claims and defenses. Therefore, under this Court's precedents, the Circuit Court erred in balking at these claims.

The duty of the Supreme Court of Appeals to consider and rule upon these claims and defenses was even more clear. Not only did the amount in controversy exceed that court's jurisdictional minimum, the West Virginia legislature also expressly authorized that court to hear appeals to the validity of taxes and appeals of constitutional issues. Again, the court offered no excuse or explanation for its failure to consider the federal-law issues. It, too, erred in restricting its inquiry to issues of state law.

By failing to address the Petitioners' constitutional challenge to the Fire Charge, the Supreme Court of Appeals has left this case in the same procedural posture in which this Court intervened in *Allegheny Pittsburgh Coal*. The taxpayers in that case, recent purchasers of land in Webster County, West Virginia, challenged the county's system of determining property assessments by almost-exclusive reference to the most recent purchase price. They contended that this practice led to long-term disparities in taxation that violated both the West Virginia Constitution and the Fourteenth Amendment's Equal Protection Clause. 488 U.S. at 339-40. In reviewing the circuit court's decision in favor of the taxpayers, the Supreme Court of Appeals acknowledged that the taxpayers' claims arose from both constitutions. *In re 1975 Tax Assessment Against Oneida Coal*, 178 W. Va. 485, 360 S.E.2d 560, 562 (1987), *rev'd sub nom. Allegheny Pittsburgh*

Coal v. County Commissioners of Webster County, West Virginia, 488 U.S. 336 (1989). However, its substantive analysis focused exclusively on the state constitutional issues. The court never addressed the federal claims, federal law or federal precedent. *See generally id.* at 562-65. Holding only that the county's assessment system comported with the West Virginia Constitution, the court reversed the circuit court below. *Id.* at 565.

This Court granted certiorari to consider the overlooked federal issue. *Allegheny Pittsburgh Coal*, 488 U.S. at 342 ("We granted certiorari to decide whether these Webster County tax assessments denied petitioners the equal protection of the law and, if so, whether petitioners could constitutionally be limited to the remedy of seeking to raise the assessments of others."). In addressing this claim, this Court looked to the Equal Protection Clause of the Fourteenth Amendment and to case law construing that provision in the context of state taxation. *See id.* at 345-46. This Court held that the county's purchase-value assessment system, which had no basis in state law, resulted in exactly the sort of "systematic" disparity in assessments and taxation that violated the Equal Protection Clause. It therefore reversed the Supreme Court of Appeals and struck down the Webster County system as a matter of federal law. *Id.* at 346.

As in *Howlett*, *Felder* and *Allegheny Pittsburgh Coal*, the Supreme Court of Appeals has overlooked the presence of a federal-law issue here. The Petitioners therefore respectfully request that this Court accept review of the decision below.

B. To the Extent, if Any, that the Supreme Court of Appeals Addressed the Constitutional Issues Raised by the Petitioners, It Created a Conflict with the Decisions of the U.S. Court of Appeals for the Fourth Circuit by Deciding that the Fire Charge is a User Fee, Rather than a Tax, for Purposes of Federal Law.

The Petitioners do not believe that the decision of the Supreme Court of Appeals addressed the federal-law aspects of their challenge to the Fire Charge. Even if this Court were to conclude to the contrary, however, this Court should still grant this Petition. If the Supreme Court of Appeals did address the federal-law issues raised by the Petitioners, then it could have affirmed the decision of the Circuit Court only by coming to legal conclusions on those issues that were directly contrary to the holdings of the U.S. Court of Appeals for the Fourth Circuit in two decisions handed down within the last six years. The reasoning of the Supreme Court of Appeals, if correct, would call into question the analysis employed by numerous federal courts, including the First and Fourth Circuits, in determining whether a particular governmental levy is a user fee or a tax.

1. Under the Supremacy Clause, the Question of Whether the Fire Charge is a "Tax" for Purposes of the Equal Protection Clause is to be Determined by Reference to Federal Law

The Petitioners have alleged throughout this action – before the Circuit Court, the Supreme Court of Appeals – that the City's efforts to collect the Fire Charge from them violate their rights under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. For purposes of federal constitutional, statutory and common law, the question of whether a particular charge is a "tax" is determined by reference to federal-law rules of decision. In *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930), this Court looked to federal law to determine whether a state-

imposed tax on oil and gas royalties was invalid as applied to the petitioner because it was inconsistent with a tax exemption granted in an Indian treaty, an area within exclusive federal purview:

> Where a federal right is concerned, we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.

Twice within the last six years, the Fourth Circuit has followed this rule and applied principles of federal law in determining whether "municipal service fees" assessed by West Virginia municipalities are actually user fees or are instead taxes. In *United States v. City of Huntington*, 999 F.2d at 74, the court looked to federal law in concluding that the defendant city's "municipal services fee" was a tax that, under the Supremacy Clause, could not be levied on federally owned property. In *Folio*, the same court made clear that this analytical model – and the result it produced – was not limited to questions of constitutional immunities but was instead applicable to all questions arising under federal law. 134 F.3d at 1217. The court again relied on a federal-law definition of "tax" in deciding that the Tax Injunction Act, 28 U.S.C. § 1341,[8] precluded the federal courts from considering at all whether Clarksburg's collection of its fire protection fee violated the Fourteenth Amendment's Equal Protection and Due Process Clauses. *Id.* at 1219.

The application of these principles here is obvious. The Equal Protection Clause establishes a federal guarantee. Therefore, the question of whether a particular assessment levied by any state or any subdivision thereof

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[8] That statute states, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

is a "tax" that violates the Equal Protection Clause is properly approached as a question of federal law.

2. The U.S. Court of Appeals for the Fourth Circuit Has Held that a "Municipal Service Fee" Levied Against All Owners of Real Property is a Tax and not a "User Fee" for Purposes of Federal Law

The Fourth Circuit has left little doubt that municipal services fees similar to the Fire Charge are to be considered taxes for purposes of federal law. In *United States v. City of Huntington*, the Fourth Circuit concluded that the fee assessed by the City of Huntington pursuant to W. Va. Code § 8-13-13 to defray the cost of fire services and flood protection was in actuality a tax that, under the Supremacy Clause, could not be levied against property in that city owned by the federal government. 999 F.2d at 74. In reaching this conclusion, the court considered "all the facts and circumstances . . . and assess[ed] them on the basis of economic realities." *Id.* at 73 (citing *United States v. City of Columbia, Missouri*, 914 F.2d 151, 154 (8th Cir. 1990)).

In its 1998 decision in *Folio*, the Fourth Circuit came to the same conclusion under the Tax Injunction Act in testing a similar fee enacted by the City of Clarksburg. The court explained its analysis:

> A tax is generally a revenue-raising measure, imposed by a legislative body, that allocates revenue "to a general fund, and [is] spent for the benefit of the entire community." [*Collins Holding Corp. v. Jasper County, South Carolina*, 123 F.3d 797, 800 (4th Cir. 1997)] (quoting *San Juan Cellular Tel. Co. v. Public Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992)). A user fee, by contrast, is a "payment[ ] given in return for a government provided benefit" and is tied in some fashion to the payor's use of the service. *United States v. City of Huntington*, 999 F.2d 71, 74 (4th

> Cir. 1993). Generally speaking, a special assessment imposed by a municipality qualifies as a tax within the meaning of the Tax Injunction Act. *See, e.g., Burris* [*v. City of Little Rock*], 941 F.2d [717,] 720 [(8th Cir. 1991)]; *Indiana Waste Sys., Inc. v. County of Porter*, 787 F. Supp. 859, 865 (N.D. Ind. 1992) (collecting cases).

134 F.3d at 1217. The court added that it found the City of Clarksburg's levy to be indistinguishable from the one that it had found to be a tax in *United States v. City of Huntington*. *Id.* On the basis of that conclusion, the court affirmed the district court's determination that it had lacked jurisdiction to hear the Folios' challenge to the Clarksburg fee. *Id.* at 1211.

Therefore, to the extent that the Supreme Court of Appeals concluded that the Fire Charge was not a tax, its holding created a conflict with the Fourth Circuit. This Court should resolve this conflict and enunciate standards that would prevent this problem from arising again in the future.

C. The Supreme Court of Appeals Acted Contrary to the Teachings of this Court when it Failed to Hold that the City's Application of the Charge to Real Property Owned by the Petitioners Violated the Petitioners' Rights Under the Equal Protection Clause of the U.S. Constitution.

Although the states have broad power under the U.S. Constitution to levy taxes, that power is not unfettered. *See, e.g., Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 151 (1911). The Equal Protection Clause, under which each state must guarantee "to any person within its jurisdiction the equal protection of the laws," is among the most important of these restrictions. That clause protects private parties against the imposition of taxes that, although facially neutral, are enforced in a discriminatory manner. *See, e.g., Allegheny Pittsburgh Coal Co.*, 488 U.S. at 345-46 (invalidating county property tax assessment system that

"select[ed recent transferees of real property] out for discriminatory treatment by subjecting [them] to taxes not imposed on other members of the same class") (quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)).[9]

Here, the City's effort to collect the Fire Charge from the Petitioners fails to afford them the equal protection of West Virginia's laws. In contravention of explicit State statutory language that places each of the Petitioners and the federal government in a single class, the City has persisted in assessing the Fire Charge against the Private Plaintiffs and the Board but not against the federal government. Moreover, because the City seeks to collect the Fire Charge from the Petitioners on the basis of the square footage of the buildings on their property, it would violate the guarantee of Article X, Section 1 of the West Virginia Constitution that property will be taxed only in proportion to its assessed value.

Here again, the decision below is in tension with this Court's decision in *Allegheny Pittsburgh Coal*. In that case, Webster County followed a practice of fixing the assessed value of all property at fifty percent of the price for which it had last sold. Although occasional adjustments were made to the assessments of property that had not recently changed hands, these adjustments were infrequent and minimal. 488 U.S. at 338-39. As a result, the petitioners' property was assessed at from eight to thirty-five times the value of comparable adjoining lots, and the county's adjustment policy would have required over 500 years to correct the imbalance. *Id.* at 341-42. The circuit court found that this system of assessment discriminated against the petitioners in violation of both the Equal Protection Clause and the guarantees of the West Virginia Constitution. *Id.* at 339-40. As noted above, the Supreme

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[9] The protection of the Equal Protection Clause extends beyond natural persons to include private entities. *See Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (holding that corporations are "persons" for purposes of Equal Protection Clause).

Court of Appeals reversed that decision, and this Court granted certiorari. *Id.* at 342.

This Court reversed the decision below and held that, given the structure of West Virginia's system of taxation, the county's assessments violated the Equal Protection Clause. This Court was careful to point out that the Equal Protection Clause could tolerate short delays in equalization of tax rates, *id.* at 343, and that the states were generally free to create reasonable classes of taxpayers and assign differing tax burdens to each of those classes, *id.* at 344. However, the Court pointed out, West Virginia law contained *nothing* that would have suggested that recent purchasers of property could be taxed any differently than persons who had owned their property for some period of time or suggested that the State's counties had the power to create such classes. *Id.* at 345. The County's assessment system, therefore, could not stand.[10]

1. The Law of West Virginia Does Not Distinguish Between the Property Owned by the Petitioners and Property Owned by Entities of the Federal Government in Any Manner That Would Allow the City to Assess the Fire Charge Against One But Not the Other.

The City's scheme for assessment of the Fire Charge suffers from the same basic flaw found to be fatal in *Allegheny Pittsburgh Coal*. West Virginia has created a single class that is *entirely exempt from property taxes*. *See* W. Va. Code § 11-3-9. Throughout the course of this action, the Petitioners and the City have agreed that the

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[10] The validity of *Allegheny Pittsburgh Coal* is in no way affected by this Court's decision in *Nordlinger v. Hahn*, 505 U.S. 1 (1992). In *Nordlinger*, this Court upheld Proposition 13, California's statutory acquisition-value property assessment system, as an explicit classification scheme by which the sovereign had rationally created classes of property and treated those classes differently for purposes of taxation. *Id.* at 15-16.

property on which the City is attempting to impose the Fire Charge and the Service Fee is within this single, exempt class of property. They have also agreed that real property owned by the federal government and its instrumentalities (principally the GSA) is within this class, as well.

The City does not treat the Petitioners' property and federally-owned property in the similar manner required by the Equal Protection Clause. The City admits that it does not collect the Fire Charge from instrumentalities of the federal government. The reason is because the federal courts have recognized that the so-called user fee is nothing more than a disguised property tax. The effect of this determination is that similarly classified entities are treated in a dramatically opposite manner. In *Allegheny Pittsburgh Coal*, this Court rejected a tax scheme that resulted in similarly classified taxpayers paying greatly disproportionate taxes as a result of the assessment methodology. It was not enough, this Court held, for the taxing body to shrug its shoulders and stick with a flawed system. Similarly, the City cannot maintain a property tax under the guise of a service fee where the effect is to cause not just a gross, but an absolute, disparity in how similarly classified entities are treated. The City's actual practice therefore, results in precisely the same type of discrimination identified in *Allegheny Pittsburgh Coal* and is similarly invalid under the Equal Protection Clause.[11]

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[11] Even if federal law were to lead to the conclusion that the Fire Charge is a "user fee" in this context, the City's practice still could not withstand scrutiny. The *Allegheny Pittsburgh Coal* Court suggested that local governments cannot create classifications unless authorized to do so by state law. *See* 488 U.S. at 345. Section 8-13-13 of the West Virginia Code, the statutory provision that authorizes municipalities to assess user fees recognizes no classes and contains no suggestion that federal property should be exempt from those fees. Similarly, the City has made absolutely no effort to classify federally

Until the City creates a true service fee that meets the reasonable parameters set by the federal courts, or until the West Virginia Legislature reexamines the tax-exempt classifications that have been maintained since this state was created, the equal protection rights of the Appellants will continue to be violated.

Despite the lack of any support in a legislative system of classification, the Fire Charge is assessed against some ostensibly exempted property owners but not against others. As applied to the Petitioners, this system violates the Equal Protection Clause and must be struck down.

2. The City's Levying of the Fire Charge on a Basis Other than Assessed Value Violates the Equal Protection Clause in the Same Manner as the Purchase Value System Challenged in *Allegheny Pittsburgh Coal*.

The City's method of assessing the Fire Charge also suffers from precisely the same flaw that this Court found to be fatal to Webster County's assessment system in *Allegheny Pittsburgh Coal*. In order to avoid the clear holdings of the Supreme Court of Appeals in cases such as *City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 172 W. Va. 505, 308 S.E.2d 527, 529 (1983), *cert. denied*, 466 U.S. 958 (1984) and *Hare v. City of Wheeling*, 171 W. Va. 284, 298 S.E.2d 820, 826 (1982), the City has chosen to impose the Fire Charge on the basis of square footage, rather than valuation. However, Article X, Section 1 of the West Virginia Constitution guarantees that property in West Virginia will be taxed only on the basis of its assessed value. Moreover, as discussed above, the Fire Charge must be

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owned property differently from property owned by any other person or entity.

considered a tax in evaluating whether it violates the Equal Protection Clause.

The Fire Charge is therefore indistinguishable from the system of taxation that this Court invalidated in *Allegheny Pittsburgh Coal*. It taxes property, but in a manner that ignores that property's value. Property burdened with large structures that have little value and little potential to generate revenue will be taxed at a higher rate than more valuable property with smaller buildings. Moreover, so long as those structures remain on a property, the disparity between the Fire Charge and the property's value will continue. The City's ordinance contains no provision for equalization over time – not even over the five hundred years that this Court held to be plainly inadequate in *Allegheny Pittsburgh Coal*. 488 U.S. at 341-42.

The implications of such a system for religious and educational entities are enormous. A tax based on square footage rather than value will burden the Petitioners with huge debts arising from classroom and sanctuary space from which they cannot legally or practically produce a profit. Regardless of the City's need for revenue, the City cannot be permitted to circumvent and flout the State of West Virginia's constitutional and statutory commands in order to raise those funds.

Under this Court's decisions interpreting the Equal Protection Clause, the Fire Charge cannot be permitted to stand. Therefore, if this Court determines that the decision of the Supreme Court of Appeals actually reached this issue, this Court should grant this Petition and affirm the correctness of its previous decisions.

CONCLUSION

For the reasons stated above, the Petitioners respectfully request that this Court grant this petition, issue a

writ of certiorari to the Supreme Court of Appeals and, upon review, reverse the decision below.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 1998 Term

No. 25143

CITY OF CLARKSBURG,
A MUNICIPAL CORPORATION,

Appellee

v.

GRANDEOTTO, INC., A CORPORATION;
BERNARD J. AND KATHY A. FOLIO; MID-CITY LAND
CO.; BERNARD J. FOLIO D/B/A HIGHRISE
ASSOCIATES; KATHRYN FOLIO; JOSEPH FOLIO,

Appellants

Appeal from the Circuit Court of Harrison County
Honorable Thomas A. Bedell, Judge
Civil Action Nos. 93-C-609-2, 93-C-648-2, 93-C-706-2,
93-C-707-2, 94-C-184-1 & 94-C-196-2

(Filed Dec. 15, 1998)

AFFIRMED

AND

No. 25401

THE CITY OF HUNTINGTON,
A WEST VIRGINIA CORPORATION,

Appellee

v.

MOST REVEREND BERNARD W. SCHMITT, BISHOP
OF THE ROMAN CATHOLIC DIOCESE OF
WHEELING-CHARLESTON,

Appellant

Appeal from the Circuit Court of Cabell County
Honorable David M. Pancake, Judge
Civil Action No. 97-C-320

AFFIRMED

AND

No. 25402

WHEELING COLLEGE, INC., A WEST VIRGINIA CORPORATION, AND THE MOST REVEREND BERNARD W. SCHMITT, BISHOP OF THE DIOCESE OF WHEELING-CHARLESTON,

Appellants

v.

THE CITY OF WHEELING, A MUNICIPAL CORPORATION,

Appellee

AND

THE CITY OF WHEELING, A MUNICIPAL CORPORATION,

Appellee

v.

THE OHIO COUNTY BOARD OF EDUCATION,

Appellant

Appeal from the Circuit Court of Ohio County
Honorable Ronald E. Wilson, Judge
Civil Action Nos. 95-C-72W & 96-C-11

AFFIRMED

Submitted: November 10, 1998
Filed: December 15, 1998

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Mark Matkovich, Esq.
City of Beckley

Jill Jerabeck, Esq.
City of Charleston

John Feuchtenberger, Esq.
City of Bluefield

Amy Haynie, Esq.
City of South Charleston

Amicus Brief

James W. Withrow, Esq.
West Virginia Municipal League, Inc.

The Opinion of the Court was delivered PER CURIAM.
JUSTICE McCUSKEY dissents and reserves the right to file a dissenting Opinion.
JUSTICE MAYNARD dissents and reserves the right to file a dissenting Opinion.
JUSTICE McGRAW did not participate in the decision of this case.

SYLLABUS BY THE COURT

1. "An ordinance which imposes a municipal service fee pursuant to *W.Va. Code*, 8-13-13 [1971] upon the owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in *W.Va. Const.* Art. X, § 1." Syllabus Point 6, *City of Huntington v. Bacon*, 196 W.Va. 457, 473 S.E.2d 743 (1996).

2. "Pursuant to *W.Va. Code*, 18-5-9 [1933], a county board of education is authorized to pay a municipal service fee imposed by a municipality for fire and flood protection services pursuant to *W.Va. Code*, 8-13-13 [1971] in order to protect the health of its pupils and in order to keep its school grounds and buildings in good order." Syllabus Point 8, *City of Huntington v. Bacon*, 196 W.Va. 457, 473 S.E.2d 743 (1996).

Per Curiam:

The three cases before us were consolidated for argument and opinion. In the first case, Grandeotto, Inc., Kathy A. Folio, Mid-City Land Co., Bernard J. Folio, d/b/a Highrise Associates, Kathryn V. Folio, and Joseph A. Folio (the Grandeottos) appeal the July 24, 1997 order of the Circuit Court of Harrison County, West Virginia, which granted summary judgment to the City of Clarksburg and ordered the Grandeottos to pay the fire service protection fee. In the second case, Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston (the Bishop or Diocese), appeals the June 12, 1998 order of the Circuit Court of Cabell County, West Virginia, which granted summary judgment to the City of Huntington and ordered the Diocese to pay the municipal service fee. In the third case, Wheeling College, Inc. (now Wheeling Jesuit University) and Bishop Schmitt (the University and the Diocese) as well as the Ohio County Board of Education (Board) appeal the August 19, 1998 order of the Circuit Court of Ohio County, West Virginia, which granted partial summary judgment to the City of Wheeling in that the court found the University, Diocese, and Board must pay the fire service fee. Other issues were reserved for further consideration.[1] That order was

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[1] The court reserved three issues for further consideration and action: the amounts owed by the University, the Diocese, and the Board; whether a binding settlement existed between the City, the University and Diocese; and whether delinquent fire service fees were owed by the Board prior to this Court's decision in *City of Huntington v. Bacon*, 196 W.Va. 457, 473 S.E.2d 743 (1996).

determined by the court to be a final, appealable order by order entered August 28, 1998.

I.

The first case involves individual landowners who own property within the City of Clarksburg. The City enacted and amended ordinances imposing fire protection and waste collection service fees under the authority of W.Va. Code § 8-13-13 (1971).[2] This Code section grants local governments authority to enact ordinances for the imposition of reasonable fees upon the users of municipal services to defray certain municipal operating costs, in this case, the costs of fire protection. Ordinance § 957.11 specifies that a flat fee is charged for fire protection services to owners of residential property; owners of

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[2] W.Va. Code § 8-13-13 (1971) states in relevant part:

Notwithstanding any charter provisions to the contrary, every municipality which furnishes any essential or special municipal service, including, but not limited to, police and fire protection, parking facilities on the streets or otherwise, parks and recreational facilities, street cleaning, street lighting, street maintenance and improvement, sewerage and sewage disposal, and the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter, shall have plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such service, to make reasonable regulations with respect thereto, and to impose by ordinance upon the users of such service reasonable rates, fees and charges to be collected in the manner specified in the ordinance: Provided, That any sewerage and sewage disposal service and any service incident to the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter shall be subject to the provisions of chapter twenty-four [§ 24-1-1 et seq.], of this code.

nonresidential unit structures and multiple-family residential structures are assessed according to square footage; nonresidential tenants must pay fifty percent of the amount per square foot that nonresidential owners must pay. The fee generates approximately $750,000 in revenue per year, which is used to defray the costs of operating the Clarksburg Fire Department. The fee comprises approximately forty-two percent of the fire department's budget of $1,809,000.

The individual landowners refused to pay the fire protection fees assessed against their various properties. The City of Clarksburg filed actions in circuit court in an effort to collect the unpaid fire service fees. The actions were consolidated by the court. After extensive discovery, the parties made a series of dispositive motions, which were converted by the court to Rule 56 motions for summary judgment. On July 24, 1997, the court granted the City's motion for summary judgment and denied the landowners' motion for summary judgment. The court determined the amount owed by each landowner and ordered that the fees be paid. It is from this order that the landowners appeal.

II.

In the second case, the City of Huntington brought an action against the Diocese to collect unpaid municipal service fees on two buildings located within the City. The purpose of the fee is to defray the costs of providing fire and flood protection. Pursuant to W.Va. Code § 8-13-13, the City of Huntington enacted Ordinance § 773.03 and began charging a municipal service fee in July 1990. The

fee is assessed as a flat fee on each lot with an additional amount assessed for each square foot of floor space in each building erected on each lot. The fee generates approximately $4,200,000 in revenue per year, while the cost of providing fire and flood protection is approximately $6,900,000 per year. Therefore, the City must pay an additional amount of approximately $2,700,000 annually to cover the cost of these services.

In conformity with the Fourth Circuit's decision in *United States v. City of Huntington, W.Va.*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109, 114 S.Ct 1048, 127 L.Ed.2d 371 (1994),[3] the City does not collect the service fee from the federal government. Nor does the City bill itself for the service fee.

The City attempted to collect unpaid fees from the Bishop or Diocese for the two schools located in the City by filing an action in circuit court in 1997. Both parties moved for summary judgment. On July 21, 1997, the court granted the Bishop partial summary judgment, stating that the April 1992 through June 1994 fee actually constituted a tax which could not be levied against the Bishop. The same order granted partial summary judgment to the City, stating that "the municipal service fee for the period of July 1, 1994 through April 24, 1997 constitutes a fee, not a tax, and can be levied against the Defendant." By order entered June 4, 1998, the court

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[3] *United States v. City of Huntington, W.Va.*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109, 114 S.Ct. 1048, 127 L.Ed.2d 371 (1994), holds that the City is barred by the Supremacy Clause of the U.S. Constitution from collecting the service fee from the federal government.

found the Diocese was liable to the City for payment of the service fee. The exact amount owed was determined by order of court entered on June 12, 1998. It is from this order the Diocese appeals.

III.

The third appeal involves two cases which were consolidated by the circuit court. Pursuant to W.Va. Code § 8-13-13 (1971), the City of Wheeling enacted Ordinance § 793.03, the purpose of which is to defray the costs of providing fire protection services to the City of Wheeling. Owners of residential unit structures are assessed a flat annual fee; owners of nonresidential unit structures are assessed a rate based on the square footage of the building; tenants of nonresidential and residential unit structures are assessed a flat fee; owners or lessees of vehicles are assessed a flat fee per vehicle. The ordinance exempts no one from paying the fire service fee; however, the City does not issue bills to itself for buildings and vehicles titled in the name of the City.

The University and Diocese filed an action against the City seeking a declaration that the fire service fee is actually a tax from which they are exempt pursuant to W.Va. Code § 11-3-9 (1998).[4] The City instituted a

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[4] W.Va. Code § 11-3-9 (1998) states in pertinent part:

(a) All property, real and personal, described in this subsection, and to the extent herein limited, is exempt from taxation:

(1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;

collection action against the Board. The Board posited essentially the same defenses to the fire service fee that the University and Diocese raised in their action. The court, therefore, consolidated the two actions. Following discovery, the parties filed cross-motions for summary judgment. The circuit court entered an order on August 19, 1998 finding that "the Defendants are authorized to pay the fire service fee imposed by the City of Wheeling[.]" Having reserved certain issues for later consideration, the court entered an order on August 28, 1998, finding that the prior order of the court "constitutes a final, appealable Order." It is from this order the University, Diocese, and Board appeal.

IV.

On appeal, the various appellants offer various assignments of error. The Grandeottos argue the Clarksburg fee is a tax which violates the Tax Limitation Amendment,[5] due process, and equal protection. The Diocese, University, and the Board argue they do not have to pay because the federal government is immune pursuant to *United States v. City of Huntington, W.Va., supra,* and W.Va. Code § 11-3-9 (1998)[6] exempts them from taxation along with the federal government. All

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(5) Property used exclusively for divine worship;

(9) Property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture[.]

[5] W.Va. Const. art. X, § 1.

[6] *See supra* note 4.

parties request that we revisit our prior decision, *City of Huntington v. Bacon*, 196 W.Va. 457, 473 S.E.2d 743 (1996). The question we must answer is whether the circuit courts erred in determining the appellants must pay the municipal and fire service fees which were assessed against them.

In *Bacon*, the City of Huntington filed suit against the Bacons, who were owners of buildings located in the City. The Bacons refused to pay the municipal service fee. They maintained the fee was a tax which violated the Tax Limitation Amendment. The circuit court disagreed and concluded the fee was a user fee which was properly imposed pursuant to W.Va. Code § 8-13-13. This Court affirmed the circuit court.

The City also brought a declaratory judgment action against the Cabell County Board of Education, seeking to determine whether the fee could be recovered from the Board in light of *United States v. City of Huntington, W.Va., supra.* The question was certified to this Court, where it was determined that county boards of education are authorized to pay municipal service fees.

We note that the federal case, *United States v. City of Huntington, W.Va., supra,* was written prior to this Court's *Bacon* decision. The *Bacon* Court determined that municipal service fees are indeed fees and not taxes. The Bacons and the Board of Education were found to be subject to the fee even though the federal government was not obligated to pay pursuant to the Supremacy Clause, Article VI, Clause 2 of the U.S. Constitution. By way of explanation, this Court stated:

> [W]here a federal entity is involved, the federal courts may determine whether a particular funding mechanism employed by a state or its political subdivision is, in fact, a tax[.]
>
> It follows, therefore, that a state is not bound by a federal court's characterization of a state tax or fee when a federal right is not involved. After all, as we have previously stated, states are free to determine their own fiscal policy as long as the fiscal policy does not violate the Constitution of the United States (citation omitted).

Bacon at 464-65, 473 S.E.2d at 750-51. The Fourth Circuit's holding did not apply to the Bacons or the Board of Education. The same is true for the appellants in the case *sub judice*.

We reiterate this Court's previous holding which states:

> An ordinance which imposes a municipal service fee pursuant to *W.Va. Code*, 8-13-13 [1971] upon the owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in *W. Va. Const.* Art. X, § 1.

Syllabus Point 6, *Bacon, supra*.

We also reiterate that:

> Pursuant to *W.Va. Code*, 18-5-9 [1933], a county board of education is authorized to pay a municipal service fee imposed by a municipality

> for fire and flood protection services pursuant to *W.Va. Code*, 8-13-13 [1971] in order to protect the health of its pupils and in order to keep its school grounds and buildings in good order.

Syllabus Point 8, *Bacon, supra.*

The circuit courts did not err in granting summary judgment in favor of the Cities of Clarksburg, Huntington, and Wheeling. Accordingly, we affirm the respective judgments of the Circuit Court of Harrison County, the Circuit Court of Cabell County, and the Circuit Court of Ohio County.

Affirmed.

No. 25143 – *City of Clarksburg, a municipal corporation v. Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio dba Highrise Associates; Kathryn Folio; Joseph Folio.*

No. 25401 – *The City of Huntington, a West Virginia municipal corporation v. Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston.*

No. 25402 – *Wheeling College, Inc., a West Virginia corporation, and the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston v. The City of Wheeling, a municipal corporaton AND The City of Wheeling, a municipal corporation v. The Ohio County Board of Education.*

MAYNARD, Justice, dissenting:

I dissent because I believe the Catholic Church, as well as all churches, and all public and other schools are exempt under W.Va. Code § 11-3-9 (1998) from paying this wolfish tax which is cloaked in the garb of a sheepish fee.[1]

First, I note the great importance of the municipal taxes at issue here. Government performs no more important service than providing its citizens with fire protection. This is a very basic and historical government service, and one that private citizens are unable to undertake for themselves. In order to provide this service, local governments must staff fire departments with trained personnel and provide these personnel with modern fire-fighting equipment. This requires a lot of money. This money is generated through the levying of taxes on those who reap the benefits of effective fire protection. This is at [sic] it should be.

However, Article X, § 1 of the Constitution of West Virginia provides, in part, that "property used for educational, literary, scientific, religious or charitable purposes . . . may by law be exempted from taxation." This constitutional authorization is codified by the Legislature in W.Va. Code § 11-3-9 (1998). Specifically, W.Va. Code § 11-3-9 provides, in pertinent part:

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[1] I dissent specifically to this Court's decisions in case numbers 25401 and 25402 involving the Roman Catholic Diocese, schools and boards of education. I believe there is no reason the appellants in case number 25143 should not pay the "fee" at issue since, unlike churches and schools, they are not exempted under W.Va. Code § 11-3-9.

> (a) All property, real and personal, described in this subsection, and to the extent herein limited, is exempt from taxation:
>
> (1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;
>
> (5) Property used exclusively for divine worship;
>
> (9) Property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture[.]

This code section derives, at least in part, from the recognition that those enumerated institutions which are supported by the public, either through taxation or private gifts, and that exist for the educational, literary, scientific, religious, or charitable enrichment of society should fulfill their missions absent the burden of taxation. This is altogether fitting and proper. The majority, however, resorts to semantic sophistry in order to avoid the unambiguous language of W.Va. Code § 11-3-9. In short, the majority holds that a tax is not a tax when it is called a fee.

In holding that if a tax is called a "fee" it can be levied against those institutions lawfully exempt from taxation, the Court opens wide the door for unlimited government collection of so-called fees. Government's penchant for taxation depends on its ability to devise increasingly creative and expensive schemes to justify the need for the levying of additional taxes. It will not be

long now before legitimate "fees" for fire and flood protection are joined by more questionable "fees" such as recreation fees, clean air fees, pollution fees, beautification fees, road paving fees, garbage fees, cultural event fees, parking fees, sporting event fees, and regatta fees. Anyone doubting that such a proliferation of government "fees" could and will occur need only look at the history of taxation in the United States in the twentieth century to be convinced. Also, while the above-mentioned "fees" may be collected to pay for desirable things, these "fees" should be labeled what they really are: taxes.

"The power to tax involves the power to destroy," noted Chief Justice John Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431, 4 L.Ed. 579 (1819). This is also true of the power to collect "fees." No matter what you call it, the money taken from the Catholic Diocese and the schools involved in this case means that there is less money in the operating budgets of these institutions. This is money that would otherwise be spent on teachers' salaries, new textbooks, equipment, or building improvements. In his oral argument before this Court, the lawyer for the Ohio County Board of Education and Wheeling Jesuit University contended that the board of education will be forced to pay almost one million dollars a year out of the school budget as a result of this "fee." This "fee," therefore, is really a tax paid by the school children in Ohio County to the detriment of their education. Regardless of whether the collection of the money is called a tax or a fee, it has the same effect on the appellants' finances. Shakespeare wrote, "That which we call a rose by any

other name would smell as sweet."[2] The Bard's words are equally true regarding the noxious odor of taxes. That which we call a tax by any other name smells just as bad.

In sum, I agree with the United States Court of Appeals, Fourth Circuit in *United States v. City of Huntington, West Virginia* in its assessment that the Huntington user fee "is a thinly disguised tax." 999 F.2d 71, 74. I believe this is true of all the fees involved here. Further, the Court of Appeals held that the federal government is immune from paying these exact same fees. Therefore, I would hold that if the federal government is immune from paying a "fee," the other entities listed in W.Va. Code § 11-3-9 are also. To say otherwise is a clear denial of equal protection to the churches and schools. Sadly, their recourse now must be to the federal courts to set things right. Accordingly, I would find that W.Va. Code § 11-3-9 exempts the Diocese and the schools from paying the "fees" at issue. This is clearly one instance in which the Diocese should not be bound to render unto Caesar. By holding to the contrary, the majority opinion opens the door to additional taxes and an increasing burden on those institutions that are, under our Constitution and by law, exempt from such taxation.

I am authorized to state that Justice McCuskey joins in this dissent.

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[2] *Romeo and Juliet*. Act II, Sc. 2, Line 43.

IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

WHEELING COLLEGE, INC., ET AL.,	)	
Plaintiffs	)	
Vs	)	CIVIL ACTION
CITY OF WHEELING,	)	NO. 95-C-72W
Defendant	)	
CITY OF WHEELING,	)	AND
Plaintiff	)	
Vs	)	
OHIO COUNTY BOARD OF EDUCATION,	)	CIVIL ACTION NO. 96-C-11
Defendant	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, after reviewing the briefs, memoranda, pleadings, joint stipulations, depositions, answers to interrogatories and admissions on file, pursuant to Rule 56 of the W.V.R.Civ.P., makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The City of Wheeling is a municipality organized under the laws of West Virginia.

2. Under the authority of W.Va. Code Sec. 8-13-13, the City of Wheeling has enacted an ordinance providing

for the payment of fire service fees by users of such services. The ordinance is found in Article 793 of the codified Ordinances of the City of Wheeling, West Virginia.

3. The City devised the following classifications for distributing the cost of fire protection services. Owners of residential unit structures are assessed a flat annual rate; Owners of nonresidential unit structures are assessed a rate based on the square footage of the building; and tenants of nonresidential and residential unit structures are assessed a flat fee.

4. Since July 1, 1993, the City of Wheeling has imposed annual fire service charges, which charges do not depend upon actual usage of the services of the City of Wheeling Fire Department, as follows:

a. Upon the owners of non-residential buildings and structures in the City in an amount equal to $0.068 per square foot contained in such building or structure;

b. Upon the owners or lessees of vehicles in the City a flat fee of $10.00 per vehicle;

c. Upon the occupants, lessee or tenants of buildings or structures in the City, a flat charge of $25.00 for each occupied unit, provided that with regard to hotels, motels, dormitories, or other buildings intended primarily for transient lodging, the flat fee of $25.00 for each occupied unit shall be paid by the owner or [sic] such unit or units; and

d. Upon the owners of residential buildings or structures in the City a flat fee charge of $75.00 per building or structure.

5. Prior to July 1, 1993, the City of Wheeling imposed annual fire service charges, which charges do not depend upon actual usage of the services of the City of Wheeling Fire Department, as follows:

a. Upon the owners of non-residential buildings and structures in the City, in an amount equal to $0.053 per square foot contained in such building or structure;

b. Upon the owners or lessees of vehicles in the City a flat charge of $10.00 per vehicle;

c. Upon the occupants, lessees or tenants of buildings or structures in the City, a flat charge of $25.00 for each occupied unit, provided that with regard to hotels, motels, dormitories, or other buildings intended primarily for transient lodging, the flat fee of $25.00 for each occupied unit shall be paid by the owners of such unit or units; and

d. Upon the owners of residential building or structures in the City a flat fee charge of $63.77 per building or structure.

6. The fire service fee is assessed on all owners and tenants of real property and vehicle owners within the City of Wheeling.

7. The City of Wheeling ordinance does not provide exemptions to the fire service fee to any party or class of parties.

8. The City of Wheeling does not issue bills for fire service charges for its own buildings or vehicles which are titled in the name of the City. These facilities included the sewage treatment plant, water department filtration

plant, animal control shelter, Clator operations center, and fire department headquarters and stations.

9. The Wheeling Housing Authority has made payments in lieu of property taxes pursuant to an agreement dated February 28, 1958, to the City of Wheeling in the following amounts for fiscal years 1991-96:

YEAR	PAYMENTS
FY 95-96	$ 9,057.92
FY 94-95	$ 7,868.99
FY 93-94	$ 9,421.46
FY 92-93	$10,635.28
FY 91-92	$10,661.81

10. Wheeling Jesuit University (University) is recognized as a tax-exempt entity for purposes of West Virginia Code Sec. 11-3-9.

11. The Board of Education of Ohio County, West Virginia (Board) is recognized as a tax-exempt entity for purposes of Sec. 11-3-9 and Sec. 18-5-5.

12. The Roman Catholic Diocese of Wheeling-Charleston (Diocese) is recognized as a tax-exempt entity for purposes of West Virginia Code Sec. 11-3-9 and includes as educational institutions Central Catholic High School, Corpus Christi Grade School, St. Michael Parish School, St. Vincent DePaul Grade School, and Wheeling Catholic Elementary School.

13. From its inception and at all times relevant to these consolidated actions, the purpose of the fire service fee has been to defray the expense of providing fire protection services for the City of Wheeling.

14. The proceeds from the fire serve [sic] fee do not cover the costs of providing the City's fire protection services.

15. The College and Diocese commenced an action against the City to prohibit the enforcement of the fire service fee ordinance as to their respective properties on the basis that the fee was an unconstitutional tax. The City initiated a separate legal action against the Board to collect delinquent fire service fees from the proceeds of the sale of excess property of the Board. Subsequently, these cases were consolidated by the Court and the Board then joined with the College and Diocese as to the constitutional arguments maintained by these entities.

CONCLUSIONS OF LAW

1) A municipal fee for fire protection established pursuant to West Virginia Code 8-13-13 is not a tax;

2) There is no significant difference between the fire service fee for the City of Huntington which was approved in *City of Huntington v. Bacon,* 196 W.Va. 457, 473 S.E.2d 743 (1996), and the fire service fee in dispute in this case;

3) Pursuant to the standards articulated with unmistakable clarity by the Supreme Court of Appeals in *Bacon,* the Defendants are authorized to pay the fire service fee imposed by the City of Wheeling;

4) The disputed and undisputed facts in this litigation do not permit this Court to undertake its own interpretation of the law of the same legal issues considered and decided in *Bacon,* or permit this Court to use the

constitutional grounds asserted by the Defendants to reinterpret the explicit mandate in *Bacon* that approved a fire service fee for institutions similar to the Defendants; and

5) Although there are facts in dispute, they are not material facts. The Defendants have failed to make a sufficient showing of a factual dispute on any essential element in this case.

ORDER

NOW, THEREFORE, it is so ORDERED that the City's Motion for Summary Judgment be, and hereby is GRANTED IN PART as to the validity of the fire service fee and liability for payment by the College, Diocese and Board; and

IT IS FURTHER ORDERED that the Motion for Summary Judgment of the College, Board and Diocese be, and hereby is, DENIED on the issue, and

IT IS FURTHER ORDERED that the following issues are reserved for further consideration and action by the Court; (i) the amounts owed by the College, the Diocese and the Board; (ii) whether or not a binding settlement existed between the City and the College and Diocese; and (iii) whether the delinquent fire service fees of the Board prior to the *Bacon supra*, decision are owed to the City.

IT IS FURTHER ORDERED that counsel appear on **the 11th day of September, 1998 at 9:15 o'clock a.m.** for a conference on the issues remaining in this litigation.

The objections and exceptions of counsel for the parties are so noted and preserved.

ENTER this 19th day of August, 1998:

/s/ Ronald E. Wilson
Ronald E. Wilson, Judge

Copies forwarded to:
Ronald M. Musser, Esq.
Peter K. Blume, Esq.
John P. Bailey, Esq.
James F. Companion, Esq.
James C. Gardill, Esq.

IN THE CIRCUIT COURT OF
OHIO COUNTY, WEST VIRGINIA

WHEELING COLLEGE, INC., ET AL., Plaintiffs	)	CIVIL ACTION NO. 95-C-72W
Vs	)	
CITY OF WHEELING, Defendant	)	AND
CITY OF WHEELING, Plaintiff	)	CIVIL ACTION NO. 96-C-11
Vs	)	
OHIO COUNTY BOARD OF EDUCATION, Defendant	)	

ORDER

On August 25, 1998 came Wheeling College, Inc., Most Reverend [sic] Barnard [sic] W. Schmitt, and the Ohio County Board of Education, by their respective counsel, and moved this Court for an Order pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure finding that this Court's Findings of Facst [sic], Conclusions of Law and Order entered in the above styled proceedings on August 19, 1998, fully adjudicated all claims concerning the validity and constitutionality of the City of Wheeling's fire service charge, that there is no just reason to delay, and that such Order constitutes a final, appealable Order. On August 25, 1998 the City of Wheeling through its counsel, moved this Court to deny such

motion. The City was given until August 27, 1998 to supplement its opposition to the Motion for an Immediately Appealable Order, which was filed accordingly with the Court.

This Court, being of the opinion that such motion should be granted, does hereby find that this Court's Findings of Facst [sic], Conclusions of Law and Oroder [sic] entered in the above styled proceedings on August 19, 1998, fully adjudicated all claims concerning the validity and constitutionality of the City of Wheeling's fire service charge, that there is no just reason to delay, and that such Order constitutes a final appealable Order.

The Clerk is directed to transmit attested copies of this Order to all counsel of record in the customary manner.

ENTER this 28th day of August, 1998:

/s/ Ronald E. Wilson
Ronald E. Wilson, Judge

A copy, Teste:

/s/ Illegible
Circuit Clerk

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 28th day of January, 1999, the following order was made and entered:

City of Clarksburg, a municipal corporation, Plaintiff Below, Appellee

vs.) No. 25143

Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio; Joseph Folio, Defendants Below, Appellants

AND

The City of Huntington, a West Virginia municipal corporation, Plaintiff Below, Appellee

vs.) No. 25401

Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, Defendant Below, Appellant

AND

Wheeling College, Inc., West Virginia corporation, and the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, Plaintiffs Below, Appellants

vs.) No. 25402

The City of Wheeling, a municipal corporation, Defendant Below, Appellee

AND

The City of Wheeling, a municipal corporation, Plaintiff Below, Appellee

vs.

The Ohio County Board of Education,

Defendant Below, Appellant

The Court, having maturely considered the petition for rehearing and reargument filed by the appellants, Wheeling College, Inc., a West Virginia corporation, the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, and the Ohio County Board of Education, and the written response filed in opposition thereto, and the petition for rehearing and reargument filed by the appellants, Grandeotto, Inc., a corporation, Bernard J. and Kathy A. Folio, Mid-City Land Co., Bernard J. Folio, d/b/a Highrise Associates, Kathryn Folio, and Joseph Folio, in the above-captioned cases is of opinion to, and doth hereby, deny the petitions for rehearing. Justices Maynard and McGraw would grant.

A True Copy

Attest: /s/ Illegible
Clerk, Supreme Court of Appeals

Supreme Court, U.S.
FILED
MAY 26 1999
CLERK

No. 98-1728

IN THE

Supreme Court of the United States

WHEELING COLLEGE, INC., A West Virginia corporation, THE MOST REVEREND BERNARD W. SCHMITT, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, and THE OHIO COUNTY BOARD OF EDUCATION,

Petitioners,

v.

THE CITY OF WHEELING, WEST VIRGINIA, a municipal corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

RESPONDENT'S BRIEF IN OPPOSITION

RONALD M. MUSSER
Counsel of Record
ROSEMARY J. HUMWAY-WARMUTH
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QUESTIONS PRESENTED

Whether this Court has jurisdiction over the instant petition inasmuch as said petition was not filed within 90 days of the date of the denial of the petition for rehearing in the Court of Appeals?

Whether the District Court and Court of Appeals correctly determined that Respondent was entitled to summary judgment on Petitioner's age discrimination claim where Petitioner failed to produce any relevant evidence from which a reasonable factfinder could conclude that Respondent's legitimate, nondiscriminatory reason for his July 31, 1996 discharge was a mere pretext for age discrimination?

Whether the District Court and Court of Appeals correctly determined that Respondent was entitled to summary judgment on Petitioner's Section 301 claim where Petitioner failed to produce any relevant evidence from which a reasonable factfinder could conclude that his collective bargaining agent breached its duty of fair representation?

PARTIES TO THE PROCEEDING

The parties to the proceeding include John C. Brazell, Petitioner, and Savannah Electric and Power Company, Respondent. In addition, the parent company of Respondent Savannah Electric and Power Company is the Southern Company headquartered in Atlanta, Georgia, and there are no other publicly held companies that own 10% or more of the stock of the Respondent.

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Appendix A — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed January 21, 1999 ..... 1a

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, denying Petitioner's petition for rehearing, is unpublished and is reproduced at "Appendix A" of this Response. The decision of the United States Court of Appeals for the Eleventh Circuit, affirming the District Court's decision, is reported at 166 F.3d 354 and is reproduced at page 1a of the appendix of the petition. The opinion of the United States District Court for the Southern District of Georgia, Savannah Division, is unpublished and is reproduced at pages 2a through 23a of the appendix of the petition.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to entertain the petition. The Court of Appeals denied Petitioner's petition for rehearing on January 21, 1999, *not* February 17, 1998 as alleged by Petitioner. (Appendix A hereto; petition, p. 1). Petitioner did not file his Petition for Writ of Certiorari until April 23, 1999, 92 days later. As such, the petition was untimely filed and this Court has no jurisdiction over it. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.

STATEMENT OF THE CASE

This is a simple, straightforward case involving the application of undisputed facts to well-settled law. Indeed, this case involves the discharge of a 58-year-old male employee for repeated acts of misconduct and his labor union's subsequent decision not to arbitrate a meritless grievance filed under the collective bargaining agreement then in effect. Nevertheless, by misstating the facts and

distorting the record, Petitioner is hopeful this Court will divine an issue where none exists. However, as will be demonstrated, there is no cause for this Court's review of this case which involves neither a conflicting decision nor an erroneous finding.

The relevant facts are accurately set forth in the District Court's opinion at pages 3a through 10a of the appendix to the petition. Briefly, the events leading to Petitioner's discharge began on or about January 5, 1996 when Respondent received a customer complaint about Petitioner from the manager of a local bank.[1] The complaint involved Petitioner having followed a female bank employee in his company truck and having intimidated her by pulling alongside her personal vehicle and then telling her he had followed her to discover where she worked and to learn if she was married. (R1-20-50-52). After investigating the complaint, including obtaining Petitioner's version of the incident (which did not differ materially from the female bank employee's version), Respondent placed Petitioner on a 12-month probationary period, warned him that any such future misconduct could result in discharge, and issued him a disciplinary memorandum with a copy of Respondent's written ethics policy. (R1-20-52-56; R1-20-28-29; R1-20-59-66; R1-20-69-70; R3-22-39-54; R3-22-54-70).

On or about July 25, Respondent received another customer complaint about Petitioner. This complaint was from the security department at a Savannah hospital and involved Petitioner's following and generally bothering two female hospital employees in and about the hospital cafeteria and gift shop. As with the first complaint,

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1. Hereinafter, all dates refer to 1996 unless otherwise noted.

Respondent investigated this second one by interviewing all parties involved, including both women, a uniformed hospital security officer, and the Petitioner. The women signed a written statement confirming that Petitioner had followed them about the hospital and made them extremely nervous. The hospital security officer confirmed the women's complaints; told of his confrontation with Petitioner at the hospital during which he requested that the latter leave the premises; and informed Respondent of yet another, similar complaint about Petitioner received from the security department at another local hospital. (R1-20-37-40; R1-20-29-30; R1-20-70-71; R1-20-94-97; R1-20-102-104; R1-20-43; R1-20-31).

Respondent then contacted the security department at the other Savannah hospital and was, in fact, informed of similar incidents involving Petitioner and two female hospital employees that had occurred there several months earlier. After obtaining this information, Respondent confronted Petitioner and, although he denied the female hospital employees' stalking accusations, he nevertheless admitted to having had a verbal confrontation with the security guard at the first hospital on or about July 25 and, further, to having been asked by the security department at the other hospital in May not to have lunch in their cafeteria in the future because of problems experienced with female employees at that hospital. (R3-22-70-88-91-121).

At the conclusion of this investigation, Respondent's human resources director made the decision to discharge Petitioner for having engaged in improper behavior towards female employees at both Savannah hospitals in violation of the terms of his January 1996 written warning and probation as well as Respondent's ethics policy. Petitioner's

employment was thus terminated effective July 31, 1996. (R1-20-30-31; R1-20-71; R1-20-75-76).

Present at Petitioner's July 31 termination meeting, at his own request, was the union's president, Bobby Long. President Long subsequently submitted a written grievance on Petitioner's behalf and, along with another union officer, conducted an independent investigation of the complaints made against Petitioner by the hospital personnel. In addition, President Long represented Petitioner at his August 26 grievance meeting with two vice presidents of Respondent (with no complaints from Petitioner), and then invited Petitioner to argue his own case for proceeding to arbitration under the labor agreement with Respondent before the union's five-member Executive Board. (President Long was not a member of that Board). Petitioner did so, but the Executive Board subsequently voted unanimously not to arbitrate his grievance based upon its analysis of the facts surrounding Petitioner's discharge and a reasoned determination that he would not prevail at arbitration. (R1-20-76-80; R1-20-85-87; R1-20-97-100; R1-20-40-41; R3-22-125-142; R3-22-144-163; R3-22-164-177). This decision was consistent with the union's practice of recent years not to arbitrate grievances the Executive Board considered meritless, even those of union members. (R1-20-80; R1-20-84-85).

Petitioner subsequently filed suit in District Court alleging that Respondent discharged him in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 612 *et seq.* (hereinafter "ADEA") and also in violation of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (hereinafter "LMRA"). (R1-1). After full discovery, Respondent moved for summary judgment as to Petitioner's

claims, which was subsequently opposed by his legal counsel. (R1-19-28). In May 1998, the District Court granted Respondent's summary judgment motion and dismissed all claims. (R2-35-36). Petitioner appealed this dismissal to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1291. On December 15, 1998, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of Respondent by per curiam decision. Petitioner then filed a petition for rehearing which was denied by the Eleventh Circuit on January 21, 1999. On April 23, 1999, Petitioner filed the instant Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

In addition to the fact that the petition is jurisdictionally out of time, this case simply is not a proper case for which a writ of certiorari should be granted. As discussed below, the lower courts fully considered the undisputed record evidence and correctly applied well-established law to the issues. Moreover, the decision of the District Court does not conflict with controlling decisions of this Court, with the decisions of the Eleventh Circuit Court of Appeals, or with the decisions of other courts of appeals.

I.

THIS COURT LACKS JURISDICTION OVER THE PETITION

As an initial matter, the petition for writ of certiorari should be dismissed on jurisdictional grounds. Pursuant to 28 U.S.C. § 2101(c) and this Court's Rule 13, a petition for certiorari in a civil case must be filed within 90 days of the

entry of the judgment below or, if a petition for rehearing is timely filed, within 90 days of the denial of the petition for rehearing. In the instant case, Petitioner timely filed a petition for rehearing, which the Eleventh Circuit denied on January 21, 1999. (Appendix A hereto). Thus, the time to file a petition for writ of certiorari began to run on that date, making April 21, 1999 the *last* day on which a petition for writ of certiorari might be timely filed. However, Petitioner, did not file his petition until April 23, 1999. Inasmuch as the 90-day limit is "mandatory and jurisdictional," the Court must dismiss the petition for want of jurisdiction. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

II.

THE LOWER COURTS CORRECTLY DETERMINED THAT RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT ON PETITIONER'S AGE DISCRIMINATION CLAIM

A. The lower courts properly concluded that there was no direct evidence of age discrimination

Before the lower courts and here again, Petitioner argues that he presented *direct* evidence of age discrimination. This evidence consists of one alleged comment made to one employee, James Ray, sometime in 1995, and one alleged comment made to another employee, Hugh Reynolds, sometime in 1994. According to Mr. Ray, when he asked his manager why he was being transferred from one supervisory position to another within his department, he was told that since he "had turned 65 years old and . . . could retire at anytime[,] . . . [the company] wanted somebody else to get the feeling of the job."

(R6-32-5-8). The comment directed at Mr. Reynolds came from a company-approved doctor who allegedly told him during a 1994 physical examination that he would be eligible for early retirement in three years. (R7-33-5-6, 15-15, 23-24).[2]

This evidence does not amount to direct evidence of age discrimination in this case. These alleged statements did not involve the Petitioner or his July 31, 1996 discharge and were made, if at all, by persons who did not make or participate in the discharge decision.[3] Indeed, as this Court has recognized, "stray remarks in the workplace . . . , statements by nondecisionmakers, or statements made by decisionmakers unrelated to the decisional process itself" do not constitute direct evidence of discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring). To the contrary, direct evidence is "evidence, which if believed, proves [the] existence of [the] fact in issue without inference or presumption.

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2. These two comments fall far short of establishing that "age discrimination was [the] common practice of the Employer," that "Mr. Ray was constantly reminded of his age and that he could retire and someone else could replace him," or that "older employees were being forced out of their positions if they did not accept the early retirement plan." (Petition, pp. 5, n.1, 8). Furthermore, the record evidence negates any such argument that Respondent was forcing out its older employees. As found by the District Court, of the fifteen employees eligible for early retirement in 1993 who, like Petitioner, were over the age of 55 and declined early retirement, nine were still working for Respondent four years later. (App. to Petition, pp. 14a-15a).

3. Human Resources Director Jim Melton made the discharge decision based on the investigation facts before him. Petitioner's manager merely signed his termination letter as the department head. (R1-20-30-31).

Evidence that merely suggests discrimination or that is subject to more than one interpretation does not constitute direct evidence." *Taylor v. Runyon*, No. 97-3202, Slip op., 1999 U.S. App. LEXIS 8412, *14 (11th Cir. May 4, 1999) (citation and quotation omitted). These statements clearly do not prove that Respondent discharged Petitioner because of his age. To be sure, they do not even suggest that this was the case. Accordingly, the lower courts properly determined that these alleged statements were not direct evidence.

B. The lower courts properly determined that Respondent met its burden of articulating a legitimate, nondiscriminatory reason for discharging Petitioner

In a circumstantial evidence case such as this one, the proof framework created by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny applies. *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (*McDonnell Douglas* provides proof scheme applicable to ADEA cases); *Walker v. NationsBank of Florida, N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995) (same). Thus, once Petitioner established a prima facie case, the burden shifted to Respondent to *articulate* a legitimate, nondiscriminatory reason for the discharge. *McDonnell Douglas*, 411 U.S. at 802. Clearly, notwithstanding Petitioner's contrary, unsupported assertion, Respondent met this exceedingly light burden. *See, e.g., Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1980) (the defendant need only set forth the reasons for the decision; it need not persuade the court that it was actually motivated by the proffered reasons).

As stated by the District Court,

> [t]here is substantial, credible evidence that [Petitioner] had behaved inappropriately toward female employees of two local hospitals while on probation for a similar incident six months earlier. More importantly, however, [Respondent] has more than demonstrated a good faith belief that those incidents occurred and constituted good cause for [Petitioners's] termination.

(App. to Petition, p. 12a). In fact, as further noted by the District Court,

> [Respondent] has submitted affidavits from every member of [Respondent's] management involved with the decision to terminate [Petitioner], as well as from those individuals who investigated the incident, and the Union officials involved in the grievance process. Those affidavits, unrebutted by [Petitioner], conclusively establish a good faith belief on the part of [Respondent] that [Petitioner] had engaged in inappropriate behavior, and that such conduct formed the basis for his discharge.

(App. to Petition, p. 14a). There is no disputing the fact that Respondent met its burden of articulating a legitimate non-discriminatory reason for Petitioner's discharge.

C. The lower courts properly determined that Petitioner failed to produce any evidence of pretext

Having met its burden of production, the burden of demonstrating pretext fell to Petitioner. *See, e.g., Burdine*, 450 U.S. at 255. Yet, Petitioner failed to produce any evidence from which a reasonable factfinder could conclude that Respondent's legitimate, nondiscriminatory reason for his discharge was a mere pretext for age discrimination. In the courts below and in his petition, Petitioner simply asserts without any record or legal citation or argument that, because the complaints made against him were "false" and because he was subsequently replaced by someone 31 years of age, he has somehow demonstrated pretext. Petitioner, however, has misunderstood his burden.

Inasmuch as "the inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of his [behavior]," Petitioner's conclusory claims of innocence simply miss the point. *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997); *see also O'Connor v. DePaul Univ.*, 123 F.3d 665, 670 (7th Cir. 1997) ("For purposes of the ADEA, we must not be concerned with whether the decision was right or wrong, fair or unfair, well-considered or precipitous. We must look only at whether the reason was discriminatory or, in the pretext analysis, whether it actually did underlie the plaintiff's termination."); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) ("The inquiry of the ADEA is limited to whether [the employer] believed that [the plaintiff] was guilty of harassment, and if so, whether this belief was the reason behind [the plaintiff's] discharge."). As so aptly found by the District Court, "[Petitioner's] contentions that the alleged misconduct did not occur . . . , even if true, fail to

provide evidence that [Respondent] did not believe in good faith that [Petitioner] had behaved inappropriately in violation of his probation." (App. to Petition, p. 14a). Thus, Petitioner's contentions fail to prove that Respondent was not motivated by the proffered reasons.[4]

As to his eventual replacement by a 31-year old female employee, although this fact may have enabled him to establish a prima facie case, it does not tend to show that the reason given by Respondent was not the true reason for his discharge. This is especially true since the terms of the collective bargaining agreement between Respondent and the union dictated that Petitioner's vacant position would be filled by the most senior, qualified applicant from the bargaining unit and, further, since the discharge

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4. The same is true with respect to Petitioner's assertions that the womens' complaints were not supported by sworn affidavits, that one of the complaints was later recanted, and that the incidents involved women with whom Petitioner had had a relationship. (Petition, p. 10). The complaining women at the first hospital were interviewed and two of them provided a signed statement confirming their complaints. (R1-20-43; R1-20-31). In any event, the fact that affidavits were not obtained simply is irrelevant to the inquiry of whether Respondent believed their accusations. Likewise, whether or not one or more of the women later recanted or had been personally involved with Petitioner has no bearing on the issue inasmuch as there is absolutely no evidence to support these alleged facts and no evidence or even assertion that Respondent was aware of these alleged facts. Furthermore, even if true, these facts would not prove that Respondent did not, in fact, believe that Petitioner engaged in inappropriate conduct, especially in light of his admissions that he did follow and question the bank employee and that he was asked by security personnel at both hospitals to leave the premises due to his misconduct. (R2-29-1-10; R1-21-4).

decisionmaker (Melton) did not even know who or how old that successful applicant might be. (R4-30-21-25; R5-31-21-22). Thus, the age of Petitioner's replacement has no relevance whatsoever to the question of the decisionmaker's motive or the real reason for the discharge.

In the end, Petitioner simply failed to produce any relevant evidence that even remotely suggests that the complaints against him by the hospital personnel were not what actually motivated Respondent to discharge him.[5] Indeed, he does not dispute that the complaints were made; does not dispute that Respondent investigated the complaints; does not dispute many of the substantive complaint allegations, such as his presence at the various bank and hospital locations, interaction with the complaining women, and security officers' requests that he leave their respective hospital premises due to his seemingly inappropriate actions; and does not dispute that he was on disciplinary probation with Respondent for engaging in similar misconduct only six months earlier. Nor does Petitioner allege or establish that similarly-situated younger employees were treated more favorably by Respondent.[6]

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5. Petitioner claims that he did not have an adequate opportunity to demonstrate pretext in the courts below, yet he fails to explain what opportunities he was denied. (Petition, p. 12). He was represented by legal counsel throughout the proceedings; he was afforded ample discovery and, in fact, engaged in the discovery process; he submitted a written response and deposition testimony in opposition to Respondent's motion for summary judgment; and the lower courts considered his arguments and record "evidence." Clearly, he was given ample opportunity to discover and present evidence of pretext if any such evidence existed.

6. In fact, the only other employee found to have violated Respondent's ethics policy in 1996 was likewise discharged. He was 34 years of age at that time. (R1-20-31-32).

Thus, the lower courts properly determined that Petitioner "failed to present evidence sufficient to cast doubt upon [Respondent's] legitimate, non-discriminatory reason." (App. to Petition, p. 17a). Accordingly, summary judgment was appropriately entered on his age claim. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (to survive a properly supported motion for summary judgment, the plaintiff must present "affirmative evidence" from which a jury might return a verdict in his favor); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

D. The lower courts properly analyzed this case under the McDonnell Douglas evidentiary framework

Petitioner argues that this Court should grant his petition for writ so as to determine whether "Title VII's McDonnell Douglas framework is applicable to ADEA cases." (Petition, p. 11). He concedes that courts have assumed that it does so, and, of course, federal courts, including this Court, have consistently so held. *See, e.g., O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) ("In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others, has applied some variant of the basic evidentiary framework set forth in McDonnell Douglas.") (footnote omitted); *Hazen Paper Co.*, 507 U.S. at 604 (applying McDonnell Douglas proof scheme to ADEA case). This is so because "[t]he ADEA and Title VII share common substantive

features and also a common purpose." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995). In fact, "the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Thus, it is only logical that the same basic burdens and presentation of proof apply to ADEA cases. Afterall, the ultimate issue in such cases is the same: did the defendant intentionally discriminate against the plaintiff. The lower courts, therefore, consistent with settled law and sound policy, properly applied the *McDonnell Douglas* proof scheme to the instant case. *See, e.g., Hazen Paper Co.*, 507 U.S. at 604; *Walker*, 53 F.3d at 1556.

In fact, Petitioner has failed to explain why a different evidentiary framework should be applied or how he has been harmed by the application of the *McDonnell Douglas* framework to his case. To be sure, there is no cause for this Court to address this novel and completely undeveloped issue, which was never raised below and which is not supported by any legal authority.

III.

THE LOWER COURTS CORRECTLY DETERMINED THAT RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT ON PETITIONER'S SECTION 301 CLAIM

To establish his Section 301 claim under the LMRA, Petitioner was required to prove both that his discharge was a violation of the collective bargaining agreement and that the union breached its duty of fair representation. *E.g., Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). As the lower

courts found, although the evidence supporting a breach of contract is "tenuous at best," the evidence supporting a breach of the duty of fair representation is entirely lacking. (App. to Petition, p. 18a). Nevertheless, just as he did before the lower courts, Petitioner is arguing that the union breached its representation duty by failing to arbitrate his grievance allegedly due to his lack of membership status and President Long's personal animosity towards him. (Petition, pp. 15-14). However, there is simply no evidence to support his theories.

As an initial matter, the union's failure to arbitrate Petitioner's grievance does not in itself constitute a breach of its duty of fair representation. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967) (the duty does not provide an employee with the absolute right to have any grievance taken to arbitration). In fact, it has long been recognized that

> in its role as the exclusive agent for all employees in the bargaining unit, the union has the power to sift out frivolous grievances, to abandon processing of a grievance which it determines in good faith to be meritless and to settle disputes with the employer short of arbitration.

Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167, 171 (5th Cir. 1971); *see also Seymour v. Olin Corp.*, 666 F.2d 202, 208 (5th Cir. 1982) ("[T]he duty of fair representation is not a straightjacket which forces unions to pursue grievance remedies under the collective bargaining agreement in every case where an employee has a complaint against the company."). To the contrary, "[a] breach of the statutory duty of fair representation occurs only when a

union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190.

As to Petitioner's allegation that the union discriminated against him based on his membership status, the evidence refutes any such notion. Indeed, the

> uncontroverted evidence demonstrat[es] that [Petitioner's] non-membership was not even discussed or considered when the Executive Board voted unanimously not to arbitrate the grievance. (Clearman Aff. 5-6; Hyslop Aff. Par 5; Pl's Resp. Ex. K). Rather, that decision was based on the Board's evaluation of [Petitioner's] claim, following the Union's independent investigation of [Respondent's] termination decision and [Petitioner's] presentation to the Board. (Clearman Aff.; Hyslop Aff.; Pl.'s Resp. Ex. K).

(App. to Petition, p. 20a).

Likewise, there is no evidence to support the allegation that Petitioner was denied arbitration because of President Long's feelings toward him. In fact, notwithstanding Petitioner's contrary unsupported assertions (Petition, pp. 6 n.2, 14), there is no evidence that President Long harbored ill feelings toward Petitioner at all. Even Petitioner conceded that the two men had had no problems since a particular incident in 1992 or 1993 and that he expressly requested President Long's involvement in the grievance process on and after July 31, 1996. (R3-22-30-35-126-142). In any event, even assuming the existence of an acrimonious

relationship between Long and Petitioner, there still exists no evidence that said relationship was the reason for the Executive Board's decision not to arbitrate his grievance. As put by the District Court,

> such an assumption does not allow the Court to infer a conspiracy among the Executive Board members, who voted unanimously not to arbitrate [Petitioner's] grievance without Long. Long did not participate in that vote.

(App. to Petition, p. 19a). Here again, the uncontroverted evidence establishes that President Long's personal feelings played no role in the union's decision not to arbitrate.[7]

The District Court and Court of Appeals thus correctly determined that Respondent was entitled to summary judgment on Petitioner's Section 301 claim. The evidence, rather than establishing a breach of duty, establishes only that the union, consistent with its practice, decided not to arbitrate a meritless grievance after independently investigating the factual circumstances that resulted in the discharge and subsequent grievance; after properly processing the grievance pursuant to the labor agreement; and after weighing all of the evidence before voting unanimously not to arbitrate.

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7. Petitioner also makes the bald assertion that he "was forced to agree to have several of the grievance processes combined in exchange for an arbitration hearing." (Petition, p. 14). He cites no evidence to support this claim and has not refuted President Long's and Board Member Clearman's affidavit testimony to the contrary. (R1-20-78-79; R1-20-85-86). Nor does he explain why he made a presentation to the Executive Board urging the members to vote to proceed with arbitration if he already had been assured of arbitration by President Long. The lower courts properly dismissed this frivolous allegation.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 21, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-08739

JOHN C. BRAZELL,

Plaintiff-Appellant,

versus

SAVANNAH ELECTRIC AND POWER COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: BIRCH, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant JOHN C. BRAZELL is denied.

ENTERED FOR THE COURT:

s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE